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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM LEE FOSTER, Defendant and Appellant.	B158257 (Los Angeles County Super. Ct. No. BA211057)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth Grimes, Judge. Reversed.

Susan K. Keiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster, Supervising Deputy Attorney General, and Michelle J. Pirozzi, Deputy Attorney General, for Plaintiff and Respondent.

SUMMARY

A jury convicted Willie Lee Foster of carrying a concealed dirk or dagger. (Pen. Code, § 12020, subd. (a)(4) [all undesignated statutory references are to the Penal Code].) After he admitted one prior strike allegation and the prosecution elected not to proceed as to two additional prior conviction allegations and one prison prior, the trial court sentenced Foster to a term of two years, eight months in state prison. He appeals, claiming the trial court improperly discharged a holdout juror (among other grounds). Because we agree that the juror's dismissal was improper and that Foster was prejudiced as a result, we reverse the judgment.

FACTUAL AND PROCEDURAL SYNOPSIS

At around 11:00 p.m. on December 13, 2000, Michael Lafayette, manager of the Study Bar in Hollywood, saw Foster sleeping on a sofa. He recognized Foster from "prior contact" with him and called 9-1-1.

When LAPD Officers Joel Miller and Luis Bonilla arrived ten minutes later, Lafayette asked the officers to remove Foster who was still asleep on the couch. The officers then arrested Foster for a prior unrelated incident. They directed him to stand up and turn around to observe for bulges, protrusions or any other suggestion of a weapon. Seeing no such indication, Officer Miller placed Foster in handcuffs and escorted him out of the bar.

Outside, Officer Miller conducted a pat down search of Foster and recovered a knife from the left front pocket of Foster's "big" "winter coat," like a parka. (It was cold that night.) Before conducting a pat down search, Officer Miller would always ask the person to be searched if he had "anything sharp on him"—"anything that might poke me, stab me or bite me[?]" Foster had not responded. When Officer Miller found the knife in

his pocket, as "defendants will sometimes do," Foster looked down and said something like: "Oh, that's a knife. I carry it for protection" or words to that effect.

Foster was charged with carrying a concealed dirk or dagger in violation of section 12020, subdivision (a)(4). It was further alleged that he had suffered three prior strikes and one prison prior, but, on the first day of trial, the prosecution elected not to proceed on one of the strikes.

At trial, the People presented evidence of the facts summarized above. Foster presented no evidence in his own defense. In his closing, defense counsel emphasized that it had been cold enough for a jacket on the night of Foster's arrest. He suggested that Foster may not have felt the knife or realized it was in the pocket of the jacket he had pulled on if it had been placed there on another occasion. He commented that Foster had just been roused from sleep and argued that Foster's adrenaline would have been pumping and his heart would have been pounding as he was escorted outside in handcuffs. When the officer retrieved the knife, Foster simply scrambled to provide an explanation. In light of the facts and the uncertainty regarding Foster's exact words, defense counsel urged the jury that there was a reasonable doubt as to whether Foster had "knowingly and intentionally" carried the knife as required under the instructions.

In a bifurcated proceeding, the jury convicted Foster of the knife charge. Later, Foster admitted one prior strike allegation, and the prosecution decided not to pursue the remaining special allegations.[1] The trial court sentenced Foster to two years, eight months in state prison.

Foster appeals.

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[1] Proceedings were suspended for several months between trial and sentencing, a period during which Foster was declared incompetent.

DISCUSSION

The Trial Court Erred in Removing a Holdout Juror.

Jury Deliberations and the Trial Court's Inquiries.

The jury began deliberating at 10:15 a.m. on May 16, 2001. At 11:35, jurors requested readback of Officer Miller's testimony regarding the response to the question "Do you have any sharp objects?" and his "quote of what he heard . . . Foster say" "regarding the reason for carrying the knife." After readback was provided, the jury broke for lunch and resumed deliberations until 2:20 p.m., when the foreperson submitted the following note: "*Unable to reach a unanimous decision at this time.* Need further assistance on how to proceed." (Italics added.) When the jury was reassembled in the courtroom, the trial court asked the foreperson if there was anything the court could do to help the jury reach a verdict, such as giving further jury instructions, offering further readback or requesting further argument from counsel. She said readback "didn't change" anything, but asked for a few minutes to discuss the proposed options with the jury.

The foreperson then submitted another note stating: "*If a juror* [the word "we" was crossed out and "a juror" written in] *chooses not to believe the testimony of the witnesses*[, t]hen how do we proceed? How do we base 'knowingly and intentional[ly]' of #3?" (Italics added.) Defense counsel expressed concern about becoming too involved in the jury's deliberative process. The court was inclined to allow counsel "to argue the credibility of the testimony that the People offered to prove the elements of know[ing] and intentional[ly]." After further discussion, however, the court decided to first ask the jury the meaning of "#3."

The next note confirmed that the reference had been to the third element of CALJIC No. 12.41 as described at page 9 of the jury instructions under the heading

"Crimes."[2] "'In order to prove this crime, each of the following elements must be proved:" "'3. That person knowingly and intentional[ly] carried a knife . . .'[.]" Again, the note stated: "*If a juror doesn't believe the testimony of all witnesses*," and reiterated: "Please clarify 'knowingly and intentionally carr[ied] a knife.'" The court advised the jury that it "interpret[ed the notes] to constitute a request for guidance how the jury should proceed if one or more jurors does not believe the testimony of all witnesses as it pertains to one of the elements of the charged offense. That is the third element in the instructions I've given you that defendant knowingly and intentionally . . . carried a knife." The court then allowed counsel to further argue in this regard.

Defense counsel reiterated his argument regarding the intent element. He stressed that Officer Miller had not been able to recall Foster's precise words, Officer Bonilla

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[2] The full instruction read: "Defendant is accused in Count One of having violated section 12020, subdivision (a)(4) . . . , a crime.

"Every person who carries concealed upon his person any dirk or dagger is guilty of a violation of . . . section 12020, subdivision (a)(4), a crime.

"The words 'dirk' and 'dagger' are used synonymously and both mean a knife or other instrument with or without a handguard that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death.

"*The mental state with which a knife or other instrument is carried may be inferred from the evidence, including the attendant circumstances, the time, place, destination of the possessor, and any other relevant facts established by the evidence.*

"In order to prove this crime, each of the following elements must be proved:

"1. A person carried a dirk or dagger.

"2. The weapon was substantially concealed upon his person; and

"3. *That person knowingly and intentionally carried a knife* or other device capable of ready use as a stabbing weapon that might inflict great bodily injury or death." (CALJIC No. 12.41, italics added.)

could not recall Foster making any statement, and although the bar manager (Lafayette) testified he had heard Foster use the words to which Officer Miller had testified (he said he had been standing six to eight feet from Foster and *behind* the officers), Officer Bonilla (the "cover officer" responsible for "mak[ing] sure . . . no one else approaches"), had testified that Lafayette had *not* been standing with the officers but had been in the parking lot—35 feet away. Defense counsel added that a reasonable interpretation of Foster's failure to respond when asked whether he had any sharp objects was that he had not realized he had the knife when he put his coat on that night.

At 9:30 the next morning, the jury resumed deliberations. At 10:55, the foreperson submitted a note (written by another juror) with the heading "[CALJIC No.] 17.41.1," suggesting juror misconduct.[3] The first portion was crossed out but could be read: "A juror has decided to discount every witness. She is unable to give any reason for her conclusion. Her single defense of her position rests on the fact that, in her opinion, a Black man in that neighborhood that knows he had a knife on him would never tell a law enforcement officer that he didn[']t have a knife because he knows that he's going to get searched anyway."

The remainder of the note read: "A majority of the jury feels that we have a juror who is [the word "obviously" was crossed out] not complying with the instructions presented by the judge." The court discussed the note with counsel in chambers. During the conference in chambers, the court received further communication indicating that the juror accused of misconduct wanted to "submit a note to the court—or at least have her position heard." A third juror also wanted to submit a note. After commenting: "So it's

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[3] The jury had been instructed as follows: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation." (CALJIC No. 17.41.1.)

by no means clear what's going on in there," the court indicated it would question the foreperson, the accused juror, the third juror and "perhaps others." Defense counsel again objected to intruding into the deliberation process in the absence of a clear indication that a juror had "absolutely refused to deliberate." The court responded that it would inquire as to whether there had been jury misconduct as, "*other than racism,* [*the accused juror is*] *not able to articulate . . . a rational basis for her conclusion*." (Italics added.)

Then, outside the presence of the other jurors, the court proceeded to question the foreperson (Juror No. 10) who explained that Juror No. 11 had written the note but the foreperson "felt it was too direct towards this one person," Juror No. 5. After crossing out the first portion, the foreperson signed it, indicating that she wanted to communicate that "we're feeling we're at [an] *impasse*." (Italics added.) She said that Juror No. 11 reported that morning that he had heard Juror No. 5 make the comment referenced in the note (that a Black man who knew he had a knife would not deny having one because he would know he would be searched anyway) the day before. She said "[Juror No. 5]'s Black. And I don't believe it's prejudice."

She said she did not think "there's simply an honest difference of opinion as to the facts," but, asked if there had been juror misconduct, she responded: "I think this person is taking a stand and is not going to change [her] mind." Asked whether Juror No. 5 was deliberating and listening, the foreperson said, "*She listens*. When asked questions as to why she feels the way she does, she . . . says she doesn't have a reason. We were asking yesterday had you given us the possibility of talking to another juror, and she kind of hesitates and says well—I don't want to say why, but *she discredited all three witnesses*. When we talk about . . . the instructions, she's only interested in that one little jury handbook that's been left on the table in regards to polling and bullying. So she feels she's being bullied." (Italics added.) At this point, the court told the attorneys (at the bench), "I don't have enough information to form an opinion yet."

When further questioning resumed, the foreperson said Juror No. 5 had *not* formed an opinion before deliberations began and she *did* deliberate and listen. She then submitted a note that Juror No. 5 had written and left the courtroom. The note read: "A concern please. [¶] A juror does not respect another juror['s] *views and opinion that differs from the vote*. The juror is bullying the other juror into *changing* [*her*] *mind*. The juror stated something to the effect that the other juror wants attention from the court and he wants to get to work and is wasting his time.

"A statement that was made yesterday to two jurors while on break in the deliberating room was misphrased today to upset this concerned juror. It is a privilege to be a juror and is treated as such by the concerned juror. The concerned juror realizes that making decisions can be difficult and will continue to try her best. If the juror who is bullying is unable to be respectful[,] maybe he should be talked with[.] Please advise on *expressing a view differently and all not agreeing*." (Italics added.) The court commented: "That does not sound like misconduct."

The court then questioned Juror No. 5 who acknowledged writing the latest note. She said the note written by Juror No. 11 about a remark she had made the day before was "miscommunication" and "not correct information." She explained that she had made a comment to two other jurors (a "young lady" and a "young man") that a "young man who has an object on him," when asked by an officer, "Do you have an object on you?" "usually" "would say something." She said, "This is during the break time . . . . This is not from the evidence that was given for me to make a decision in. My decision is not based on my feelings of what I said to the other two jurors on my break time." The court asked: "You said something about a young person, not a Black person?" She clarified: "Well[,] I said a young Black person. That's what I said."

Juror No. 5 said that "the one particular juror . . . brought that out to say that is why I do not agree with a particular part and said he is not wasting his time and he needed to get to work and wanted me to change my view on that particular section—on

that element." Defense counsel commented, "I think . . . we['ve] got a hung jury, period."

The court then questioned the two jurors to whom Juror No. 5 had made her comment (Juror Nos. 2 and 7). Juror No. 2 said Juror No. 5 had said during a break when "different discussions . . . were going around the table" "something to the effect" that "a Black man is forced to do this or carry in this day and society. As soon as it got to that point, myself and the other juror basically said[, ']Wait a minute, that's not relevant. You can't bring in those perceptions or those generalities into this. We have to look at the facts.' *We basically shut the conversation down* at that point" because "I personally took an offense to it." (Italics added.)

He explained that Juror No. 11 said he had overheard this statement the day before and brought it up that morning. He thought Juror No. 5 had actually made the statement quoted in Juror No. 11's note (a Black man in that neighborhood that knows he has a knife on him would never tell a law enforcement officer that he didn't because he knows that he's going to get searched anyway) that morning in the context of clarifying, "No, this is what I was stating."

"That's how basically the whole statement got finished. But at the time when the statement was made, it was just getting into the statement and we cut it off. [A]s soon as we heard the association of race or whatever else, you know, attached to it, we said[,] [']Stop, it's not part of what we're here for.'"

Similarly, asked about the conversation with Juror No. 5 the day before, Juror No. 7 said, "we were talking about whether or not the knife was in his pocket and . . . she said . . . that a Black man in that neighborhood usually has a knife in his pocket. And immediately we said we can't go with race. We don't care what color he is. And [Juror No.] 2 said[,] [']I don't care if he's green or purple or blue, it doesn't matter what color he is.' And so we changed the subject."

"It came up this morning *when we were trying to figure out why she insists on not believing witnesses.*" (Italics added.) When the whole group was discussing the

statement, Juror No. 5 said, "We took it out of context. That she didn't mean it that way—meaning race." Juror No. 7 understood her to mean race, and "No one else had mentioned that. That was not an issue."

Juror No. 5's Removal.

The trial court concluded that Juror No. 5 was "disingenuous" in reporting what she had said during the break. "She well knew what the question was, and yet she told me she said young man. There's a difference between a young man and young Black man, especially since the jurors with whom she had the conversation immediately, in effect, accused her of racism. So when she came in here to talk to me about it, she omitted the rather critical word which provoked the note from the jury in the first place. I think she is deciding the case based on personal experiences and perceptions, based on her experiences or the experiences of others that, in her own words, have nothing to do with the evidence in this case." Regarding Juror No. 5's comment that her "racial observation . . . didn't enter into her deliberation," the court stated: "I disbelieve that. I think that was self-serving [t]o put herself in a better light. I think she assumed a defensive posture now because she has been under attack."

Over defense objection, Juror No. 5 was excused and an alternate substituted in her place. A defense motion for a mistrial was denied. The court instructed the jury to "begin deliberating anew." Within ten minutes, the jury had reached its verdict, finding Foster guilty as charged.

The Trial Court Erred in Discharging Juror No. 5.

As relevant, section 1089 provides: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or *upon other good cause shown to the court is found to be unable to perform his duty* . . . , the court may

order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors." (Italics added.) We review the trial court's determination to replace a juror with an alternate for an abuse of discretion; however, "a juror's inability to perform as a juror must '"appear in the record as a demonstrable reality."'" (*People v. Marshall* (1996) 13 Cal.4th 799, 843.)

A week before the trial in this matter, our Supreme Court issued its decision in *People v. Cleveland* (2001) 25 Cal.4th 466. (There is no mention of this decision in the record.)[4] The *Cleveland* court emphasized that "a trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations. The inquiry should focus upon the *conduct* of the jurors, rather than upon the *content* of the deliberations. Additionally, the inquiry should cease once the court is satisfied that the juror at issue is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and that no other proper ground for discharge exists. . . ." (*Id.* at p. 485, italics added.)

"[P]roper grounds for removing a deliberating juror include refusal to deliberate. A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by

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[4] After its initial conference with counsel in chambers upon receipt of Juror No. 11's note (referencing CALJIC No. 17.41.1 and stating that Juror No. 5's only defense for her position was that a Black man in that neighborhood who had a knife would never tell a police officer that he didn't because he would know he would be searched anyway), the trial court stated for the record that, in *People v. Thomas* (1990) 218 Cal.App.3d 1477, the trial court had properly excused a juror "on somewhat similar facts"—although the juror denied saying so, the foreperson said the juror "could not accept the testimony of the police officers who testified because police officers in L.A. generally lie." In addition, the prosecutor had referred the court to *People v. Feagin* (1995) 34 Cal.App.4th 1427, a case in which a juror was "excused for not deliberating and forming an opinion without deliberating, in addition to being influenced by racial prejudice."

listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury. *The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge.* Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge. A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate simply because the juror expresses the belief that further discussion will not alter his or her views." (*People v. Cleveland, supra,* 25 Cal.4th at p. 485, italics added.)

Applying these principles to the circumstances presented here (which bear a notable similarity to the circumstances in the *Cleveland* case), we conclude that the trial court abused its discretion in excusing Juror No. 5 as the record before us does not establish "as a demonstrable reality" that Juror No. 5 refused to deliberate.[5] Although

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[5] "[I]n questioning a juror to determine whether the juror is refusing to follow the trial court's instructions on the law, as alleged by other jurors, a trial court should conduct only a very limited inquiry. The court should caution the juror that it does *not* want to know whether the juror is voting to convict or acquit the defendant, or the reasons for that vote. The court should then state that it wants to know *only* whether the juror is willing to abide by the juror's oath to decide the case '"according only to the evidence presented . . . and . . . the instructions of the court'" (Code Civ. Proc., § 232, subd. (b)), to which the juror is to respond only with either 'yes' or 'no.'

"If the juror's answer is 'yes,' the trial court should simply order the entire jury to resume deliberations. If the answer is 'no,' the court should discharge the juror in question. If the juror's answer is equivocal, the trial court may have to inquire further. In doing so, however, the court should be mindful of these words of warning: "Where the duty and authority to prevent defiant disregard of the law or evidence comes into conflict with the principle of secret jury deliberations, we are compelled to err in favor of the lesser of two evils—protecting the secrecy of jury deliberations at the expense of possibly

Juror No. 11's note asserted that Juror No. 5 was "not complying" with the court's instructions, this assertion is not supported by the record. Rather, several jury communications had already indicated that Juror No. 5 simply viewed the evidence—that is, the evidence regarding the third element of CALJIC No. 12.41—differently from the way the rest of the jury viewed it.[6] (See *People v. Cleveland, supra,* 25 Cal.4th at pp. 485-486.) Further questioning only confirmed as much.

The foreperson (Juror No. 10) specifically stated that Juror No. 5 had not formed an opinion before deliberations, had listened and had participated in deliberations. The trial court's inquiry confirmed that it was Juror No. 5's apparent *conclusion* that the "knowing[] and intentional[]" element had not been proven that was at issue. In context, responses from Juror Nos. 2, 5 (the juror accused of misconduct) and 7 suggested that Juror No. 5 found some or all of the defense argument that inconsistencies and uncertainties in the witnesses' testimony and the existence of a reasonable alternative interpretation of the evidence under the circumstances provided a reasonable doubt as to Foster's guilt of the charged crime persuasive. It appears that she attempted to explain the basis for her view, but once she mentioned race, the other jurors shut down the

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allowing irresponsible juror activity.' [Citation.]." (*People v. Williams* (2001) 25 Cal.4th 441, 464, underlining added (conc. opn. of Kennard, J., quoted and cited with approval in *People v. Engelman* (2002) 28 Cal.4th 436, 445).)

[6] Juror No. 11's note triggering the trial court's inquiry specifically referenced CALJIC No. 17.41.1. In *People v. Engelman, supra,* 28 Cal.4th at page 440, the court determined that this instruction should no longer be given in criminal trials. "CALJIC No. 17.41.1 not only has the potential to lead members of a jury to shed the secrecy of deliberations, but also to draw the court unnecessarily into delicate and potentially coercive exploration of the subject matter of deliberations." (*Id.* at p. 447.) "It is difficult enough for a trial court to determine whether a juror actually is refusing to deliberate or instead simply disagrees with the majority view. . . . *Drawing this distinction may be even more difficult for jurors who, confident of their own good faith and understanding of the evidence and the court's instructions on the law, mistakenly may believe that those individuals who steadfastly disagree with them are refusing to deliberate or are intentionally disregarding the law*." (*Id.* at p. 446, citations omitted and italics added.)

conversation, rejected her view and decided that Juror No. 5 was refusing to follow the court's instructions.

This case demonstrates the "risk inherent in 'permit[ting] trial judges "to conduct intrusive inquiries into . . . the reasoning behind a juror's view of the case, or the particulars of a juror's (likely imperfect) understanding or interpretation of the law as stated by the judge" . . . .'" (*People v. Engelman, supra,* 28 Cal.4th at p. 445.) When questioned by the court, Juror No. 5 again tried to make the point that she had apparently tried to make in the jury room—that someone in Foster's circumstances, *who knew he had a knife* and was about to be searched, would have said something in response to a police officer's question whether he had any sharp objects. (See CALJIC No. 12.41 ["The mental state with which a knife or other instrument is carried may be inferred from the evidence, including the attendant circumstances, the time, place, destination of the possessor, and any other relevant facts established by the evidence"].)

Because of her mention of race, the trial court concluded that Juror No. 5 had "no rational basis for her conclusion"; then, based on her later omission of race, the trial court found Juror No. 5 to be "disingenuous" although, as she had previously tried to explain (in the jury room) that she "didn't mean it that way—meaning race" and (in the courtroom) that her decision was "not based . . . on what [she had] said to the other two jurors." Rather, it had been Juror No. 11 who had *inferred* from Juror No. 5's comment that she was disregarding the court's instructions; however, the record does not establish Juror No. 5's refusal to deliberate "as a demonstrable reality." (*People v. Cleveland, supra,* 25 Cal.4th at p. 485.) To paraphrase the *Cleveland* court, "It is possible that Juror No. [5] employed faulty logic and reached an 'incorrect' result, but it cannot properly be said that [s]he refused to deliberate." (*Id.* at p. 486.)[7]

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[7] Foster also says the trial court erred in failing to provide the jury with proper guidance when it requested clarification of the third element of CALJIC No. 12.41 ("knowingly and intentionally carried a knife" within the meaning of section 12020, subdivision (a)) or, in the event this claim was waived, his trial counsel was ineffective.

Under these circumstances, the trial court abused its discretion in excusing Juror No. 5. This error is prejudicial and requires reversal of the judgment.[8] (*People v. Cleveland, supra,* 25 Cal.4th at p. 486.)

DISPOSITION

The judgment is reversed.

WOODS, J.

We concur:

PERLUSS, P.J. JOHNSON, J.

In light of our resolution of Foster's first claim of error, however, it is unnecessary to address these additional arguments.

[8] We note that our Supreme Court recently stated in *People v. Hernandez* (2003) 30 Cal.4th 1, 3: "We conclude that, although defendant is entitled to the benefit of a reversal of his conviction by reason of the error in excusing the juror, he is not also immune from reprosecution. As a general rule, the double jeopardy guarantee imposes no limitation on the power to retry a defendant who has succeeded in having his conviction set aside on appeal on grounds other than insufficiency of the evidence." Neither the prosecution nor the defense addressed the issue of whether double jeopardy principles bar retrial in this case in their briefing, and both sides waived oral argument. Accordingly, we do not decide whether there is any basis for concluding that the circumstances of this case are outside the ambit of *People v. Hernandez*.